IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

UNITED STEELWORKERS OF AMERICA, CIO,
AND NUTONE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT UNITED STEELWORKERS OF AMERICA

ARTHUR J. GOLDBERG,
General Counsel
DAVID E. FELLER,
Associate General Counsel
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
Attorneys for Respondent
United Steelworkers of America

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
THE FACTS	2
ARGUMENT	4

AUTHORITIES CITED

Cases:

American Thread Co., 101 NLRB 1306 (1952) 5

Bonwit Teller, Inc. v. *NLRB*, 197 F. 2d 640 (2d Cir. 1952) 5, 6, 7, 8, 10

Crown Drug Co., 110 NLRB 845 (1954) 10

General Drivers, etc. v. *NLRB*, 179 F. 2d 492 (10th Cir. 1950) 9, 10

Goodall Co., 86 NLRB 814 (1949) 5

Johnston Lawnmower Corp., 107 NLRB 1086 (1954) 5

Le Tourneau Company of Georgia, 54 NLRB 1253 (1944), *set aside* 143 F. 2d 67 (CA 5, 1944), *reversed* 324 U.S. 793 (1945) 4

Lincourt v. *NLRB*, 170 F. 2d 806 (1st Cir. 1948) 9

Livingston Shirt Corp., 107 NLRB 400 (1953) 5

Macon Textiles, Inc., 80 NLRB 1525 (1948) 5

May Department Stores Co., 59 NLRB 976, *enforced* 154 F. 2d 533 (8th Cir. 1946), *cert. denied* 329 U.S. 725 (1946) 6

NLRB v. *American Furnace Co.*, 158 F. 2d 376 (7th Cir. 1946) 5

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) 5, 7

NLRB v. *Waterman S.S. Corp.*, 309 U.S. 206 (1940) 5

NLRB v. *F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954) 5, 6, 7, 8

Parker Bros. & Co., Inc., 110 NLRB 1909 (1954) 10

Peerless Plywood Co., 107 NLRB 427 (1953) 10

Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 (1945) 4, 5

Times Square Stores Corp., 79 NLRB 361 (1948) 10

United States v. *Lane Motor Co.*, 344 U.S. 630 (1953) 11

Statute:

National Labor Relations Act, 1947

(61 Stat. 136; 29 U.S.C. § 141 et seq.) 3, 6, 10

Section 8(a)(1) 3, 4

Section 8(c) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 785

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

UNITED STEELWORKERS OF AMERICA, CIO,
AND NUTONE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT UNITED STEELWORKERS OF AMERICA

The Board's petition here has artfully rephrased the question and restated the facts so as to obscure the real issue involved. Although, for reasons to be stated below, we agree that certiorari should be granted, we think that the Court is entitled to know, with somewhat more precision, what this case is about.

QUESTION PRESENTED

The question here presented, as stipulated below (R. 9-10) by all of the parties—the Board, the Union, and the Company—is this:

> "Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an other-

wise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter." (R. 8)

THE FACTS

In the spring of 1953 the Steelworkers Union tried to organize the employees of NuTone, Inc. The Company was not neutral. It actively opposed the Union. In addition to discharging three employees because they were active on behalf of the Union, it "actively campaigned for the Union's defeat" by ordering foremen to distribute "anti-union propaganda" [1] throughout the plant.

At the same time as it engaged in this campaign to defeat the Union, it posted a notice warning the employees that they must not "pass out handbills or other literature on company property." (R. 26) Indeed, as the Trial Examiner here noted, "one piece of the Company's campaign material was distributed on the very date on which the Company posted its . . . rule . . . which prohibited employees from passing out literature on Company property." (R. 27)

The Union lost the election. Immediately thereafter, in accordance with a suggestion "which the Company had planted in its election propaganda" (R. 37), an "inside" union was organized. The Company gave this organization its open assistance and support. Part of this support was mimeographing material for the "inside" union and having it distributed by foremen and others throughout the plant.

[1] The words are those of the Trial Examiner. (R. 27) The Board, in a masterpiece of understatement, now refers to this literature as "anti-union in tone." (Pet. p. 4) Typical of this "tone" was the following exhortation in one leaflet: "Don't let the Union take away your future opportunities at NuTone. Don't get mixed up in strikes." (R. 27)

in the same way that the Company's anti-Steelworker campaign material had been distributed.[2] (R. 40-41)

The Union filed unfair labor practice charges (and also sought to set aside the election). In the unfair labor practice proceedings, the Company was found to have violated the Act by the three discharges and the assistance to the "inside union" (R. 50, 57, 60), and these findings are not contested here. With respect to the claim that the employer had discriminatorily enforced the no-distribution rule, the Trial Examiner concluded that when "the Company itself entered the anti-union lists and actively campaigned for the Union's defeat on a field to which it had denied admittance to the Union" it committed an unfair labor practice. (R. 27, 54) The Board reversed, Member Murdock dissenting. The Board's view, concisely stated,

---

[2] In explanation of these apparent violations by the Company of its no-distribution rules, the Company in the court below blandly asserted that there was no such violation because the rules was never intended to prevent the Company from campaigning in this way against the Union; it was only intended to apply to employees:

"NuTone never intended to restrict its own posting and distribution activities when it announced them. NuTone was not talking out of both sides of its mouth at once—both to itself and to its employees; it meant that only voting employees would hear and heed the rules and it spoke directly to them, alone.

"One more important consideration is the intended *duration* of these rules. This intendment is to be ascertained by fitting them into their factual context—a situation beginning with the raising of the representation question which brought on the intense campaigning and in consequence, the rules, but which ended with finality on the election date. The rules were clearly intended to deal with a short period and a transitory situation . . . They did become ineffective automatically on August 19.

"Therefore, in plain and controlling distinction from similar decisions finding violations of Section 8(a)(1), NuTone did not discriminatorily enforce its no-distribution rule by enforcing it against employees while relaxing it with respect to itself, for the rule never applied to it."

(Brief for NuTone, Inc. in Nos. 12,754 and 12,812, Court of Appeals for the District of Columbia Circuit, pp. 43-44.)

was that "management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself." (R. 59) And so, in the name of free speech, the Board sanctioned the employer's action in prohibiting the employees from disseminating their views on the union question through the distribution of literature on company property while, at the same time, he ordered foremen to use that same method of communication in campaigning against the union.

The Court of Appeals, in turn, reversed the Board and directed it to issue the order which the Trial Examiner had recommended. The Board, the Solicitor General *dubitante*,[3] has petitioned for certiorari.

ARGUMENT

1. The decision below is plainly correct. The question is not, as the Board puts it, "whether . . . enforcement against employees of no-distribution . . . rules, valid under the *Republic* and *LeTourneau* test, becomes an unfair labor practice if the employer is himself disseminating his own non-coersive views concerning unionization," (Pet. p. 9) Everyone concedes that an employer can enforce valid no-distribution rules and at the same time disseminate his own views concerning unionization. The question is whether he unlawfully interferes with the employees' right under Section 8(a)(1) of the Act to engage in self-organizational activities if he forbids them to use, on their own time, precisely the same method of dissemination which he directs his foremen to use in campaigning against the union. That question, we believe, answers itself.

The applicable principles are well established by decisions of this Court. First, "no restriction may be placed on the employee's right to discuss self-organization among themselves, unless the employer can demonstrate that a restric-

[3] Pet. p. 11, fn. 6.

tion is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 803."[4] Second, if such restriction is permissible to maintain production or discipline, it is only valid, even as to non-employees, "if the employer's notice or order does not discriminate against the union by allowing other distribution." *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 at 112.

The decision of the Court of Appeals in this case is the only possible one under these principles. It is in accord with every other decision by this Court, the courts of appeals, and the Board itself, prior to the change of position signalled by the Board's 1953 decision in *Livingston Shirt Corp.*, 107 NLRB 400. See, e.g., *NLRB* v. *American Furnace Co.*, 158 F. 2d 376 (7th Cir., 1946); *Macon Textiles, Inc.*, 80 NLRB 1525 (1948); *Goodall Co.*, 86 NLRB 814 (1949); *American Thread Co.*, 101 NLRB 1306 (1952); *Johnston Lawnmower Corp.*, 107 NLRB 1086 (1954). See also *Labor Board* v. *Waterman S. S. Co.*, 309 U.S. 206.

2. The Board asserts that the decision below conflicts with the Sixth Circuit decision in *NLRB* v. *Woolworth Co.*, 214 F. 2d 78, and the dissenting opinion of Judge Swan in *Bonwit Teller, Inc.* v. *NLRB*, 197 F. 2d 640, 646 (C.A. 2).

The *Woolworth* and *Bonwit Teller* cases deal with a somewhat different situation than that presented here. In both of those cases the employer operated a retail store. In both cases the employer closed the store and assembled the employees, on working time and on company property, to listen to an anti-union address. And, in both cases, a union organizer requested the company to perform a similar service

---

[4] The rule is quoted as described by this Court in *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113. This principle obviously applies to the distribution of literature as well as oral solicitation, the only difference being that the facts necessary to demonstrate that restriction is necessary to maintain production or discipline may be different in the two cases.

for the union, providing it with a "captive audience" similar to the one which the employer addressed. The question in both cases was whether a Board decision that the employer's refusal to provide this audience for the union organizer was an unfair labor practice should be enforced. Both circuits agreed that it should not be.

There the agreement ended, however. The Second Circuit, in *Bonwit Teller,* said nothing required the "eye for an eye, tooth for a tooth" result demanded by the Board. 197 F. 2d at 646. But it went on to note that the employer, simultaneously with its use of the "captive audience" device, enforced a rule which prohibited any union solicitation on the selling floor, even on non-working time. It was ordinarily entitled to enforce such a rule because of the special conditions affecting retail stores. *May Department Stores Co.,* 59 NLRB 976, *enforced* 154 F. 2d 533 (8th Cir. 1946) *cert. denied* 329 U.S. 725.[5] But, said the Second Circuit, the employer's use of the premises, involved in the captive audience speech, constituted discriminatory application of the no-solicitation rule and hence was an unfair labor practice. In this view, "neither § 8(c) nor any issue of free speech" was involved. Judge Swan dissented on this second point.

In the *Woolworth* case in the Sixth Circuit, two of the judges were in agreement with the Second Circuit that the employer need not provide a captive audience for the union if it provided one for itself, but they divided on the question of discriminatory enforcement of the special, broad, no-solicitation rule. Judge Allen, for herself alone, said that a no-solicitation rule, no matter what its scope, could not cut down the absolute right of free speech granted by § 8(c)

[5] Significantly, the Board in that case simultaneously established its definitive rule that all solicitation on the selling floor of a retail establishment could ordinarily be banned and found that in the particular case the ban violated the Act because it was discriminatorily enforced.

of the Act. 214 F. 2d at 83. If the employer's broad no-solicitation rule was privileged, for the reasons found by the Board, the fact that the employer made a speech to the employees on company time and property could not make it invalid. In so concluding she expressly disagreed with the majority of the Second Circuit in the *Bonwit Teller* case and agreed with Judge Swan's dissent. *Id.* at 81. Judge Miller concurred in the result, but on the special ground that the rule against employee solicitation on non-working time was not involved and had not been enforced. Judge McAllister dissented.

The *Bonwit Teller* and *Woolworth* cases, as must now be apparent, are quite different from the present case. The principles applicable to no-solicitation rules are also applicable, by analogy, to no-distribution rules. But in *Bonwit Teller* and *Woolworth*, the employer did not forbid solicitation by employees during store hours and simultaneously instruct his foremen to solicit against the union under the same circumstances—which would be the precise parallel to the present case. Instead he closed the store, assembled the employees and made an anti-union speech. Furthermore, in both cases the unfair labor practice found by the (old) Board was the refusal of a request by a union organizer (not an employee) that the employer take the affirmative action of assembling the employees on company premises to hear a pro-union speech. Cf. *Labor Board* v. *Babcock & Wilcox Co., supra.*

In this case, on the contrary, the union's grievance was not that the employer should distribute leaflets for it—although the employer did both mimeograph and distribute leaflets for the company union which was organized after the election. The grievance of the union here is simply that the employer refused to permit the employees to distribute their own leaflets in the plant during non-working time while supervisors were being directed to distribute anti-union leaflets on the same premises.

We do concede, however, that the broad reasoning which Judge Allen used in the *Woolworth* case is inconsistent with the reasoning of the court below (as well as with the principles established by this Court and uniformly adhered to by the Board prior to 1953). It is even more inconsistent, and expressly so stated, with the majority decision of the Second Circuit in the *Bonwit Teller* case. *Bonwit Teller* says that there is no issue as to free speech where a no-solicitation rule is found to be discriminatorily enforced because the employer violates it. Judge Allen in the *Woolworth* case says to the contrary, that the presence of a no-solicitation rule cannot limit employer free speech.

The Board apparently did not consider the fact that Judge Allen's opinion is in flat conflict with that of the Second Circuit, as well as the decisions of every other court that has dealt with the subject, to be sufficient to call for a petition for certiorari in the *Woolworth* case. Instead, it adopted Judge Allen's view. Now that the Court of Appeals for the District of Columbia, in a different factual situation, has adhered to the simple principle established by this Court that rules against solicitation and distribution must be applied without discrimination, the conflict is represented as being of such nature that certiorari should be granted even though the Solicitor General avows his doubts as to the correctness of the Board's position!

3. Were the considerations above the only relevant ones we would not urge that the Board's petition be granted. We would confidently expect that, if certiorari were denied, the Board would not continue to rely on Judge Allen's opinion, in contradiction to the views of this Court, the Second Circuit and the court below.

But in an extra-ordinary footnote, appended to the Board's petition for certiorari, the Solicitor General informs the Court that the Board "intends to adhere to its present position unless and until the contrary views expressed in

the decision below should be definitively accepted." [6] Since this is asserted as a reason for granting certiorari, we assume that a denial of certiorari would not constitute such a definitive acceptance of the views of the court below as to cause the Board to adhere to them.

This assertion, we believe, supplies a sufficient and, indeed, a compelling reason for this Court to grant certiorari.

To understand the importance of the Board's position, it is necessary to remember that no conflict of decision is likely to arise if the Board adheres to the course which it has thus announced. Indeed, it is unlikely that any other case will be presented for judicial decision in which the question here involved can again be reviewed. The General Counsel of the Board will not, in the normal course of events, issue a complaint if the Board has made it clear in its decisions that the conduct complained of does not constitute an unfair labor practice. [7] The present case arose only because the General Counsel of the Board assumed, as he had every right to assume on the basis of prior Board decisions, that the employer's actions here constituted an unfair labor practice. If the Board adheres, as it has said it will, to its present position, the General Counsel will presumably not issue complaints in cases like the present one. Since the refusal of the General Counsel to issue a complaint is not reviewable in any court [8] no unfair labor practice case is likely to arise in which the definitive acceptance required by the Board can be achieved.

Even more importantly, the Board's decision to adhere to its present views despite the decision of the court below will have a very great impact on its conduct of representation proceedings, without any possibility of review in this

---

[6] Pet. p. 11.

[7] See the remarks of General Counsel Kammholz quoted in 36 LRRM 211.

[8] *Lincourt* v. *NLRB*, 170 F. 2d 306 (1st Cir. 1948); *General Drivers* v. *NLRB*, 179 F. 2d 492 (10th Cir. 1950).

or any other court. Normally, where an employer has discriminatorily applied its no-solicitation or no-distribution rules in an election campaign, the union will protest the conduct of the election as well as file an unfair labor practice charge.[9] In this case, indeed, just such objections were filed. Under the Board's established rules those objections will be sustained only if the General Counsel issues an unfair labor practice complaint. They will be overruled if the employer's actions do not constitute an unfair labor practice. *Times Square Stores Corp.*, 79 NLRB 361 (1948); *Parker Bros. & Co.*, 110 NLRB 1909 (1954). Cf. *Crown Drug Co.*, 110 NLRB 845 (1954), and *Peerless Plywood Co.*, 107 NLRB 427 (1953) (24 hour rule on speeches). In accordance with this rule, the Regional Director here dismissed the union's objections to the conduct of the election after the Board's decision in the unfair labor practice case and in reliance on it.[10]

The result is that in any election proceeding in which there is the kind of discriminatory application of no-distribution or no-solicitation rules which is involved here, a union will not be able to challenge the conduct of the election and obtain a new election unprejudiced by such conduct. And there is no possible way in which a union can challenge the Board's rulings to that effect. See *General Drivers* v. *NLRB*, 179 F. 2d 492 (10th Cir. 1950). If this Court should affirm the decision below, on the other hand, the contrary result will follow.

For these reasons, the effect of the Board's assertion that, unless this Court grants certiorari, it will continue to administer the Act in accordance with the views of Judge Allen will be to establish a rule affecting both unfair labor practice cases and representation proceedings which is contrary to the principles established by this Court and every

[9] See, e.g., *Bonwit Teller, Inc.* v. *NLRB*, 197 F. 2d 640 at 642, fn. 1.

[10] *NuTone, Inc.*, Case No. 9-RC-2020 (unreported).

other court that has passed on the question but will become virtually unreviewable in any court. The "definitive acceptance" which the Board apparently requires in order to accomplish a change in its administration of the Act can only come as a result of a grant of certiorari in this case.

Under these circumstances we concur with the Solicitor General that it is appropriate that the Court grant certiorari to resolve the conflict between Judge Allen's opinion and that of the court below. We suggest, however, that the Solicitor General does not go far enough. The difficulty presented by the Board's position can be remedied by summarily affirming the decision of the court below. Cf. *U.S. v. Lane Motor Co.*, 344 U.S. 630.

Respectfully submitted,

ARTHUR J. GOLDBERG,
General Counsel
DAVID E. FELLER,
Associate General Counsel
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
Attorneys for Respondent
United Steelworkers of America